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No. 00-116

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CLERK

In The

Supreme Court of the United States

KENNETH B. ZAMVIL,

Petitioner,

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT and CHARLES CADMAN, SUPERINTENDENT,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENTS PETALUMA JOINT UNION HIGH SCHOOL DISTRICT'S AND CHARLES CADMAN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Supreme Court jurisdiction exists to review a state law contract rescission action where no federal or constitutional issues were raised in the proceedings below.

Whether there may exist a viable claim of duress for purposes of rescission where a resignation agreement was negotiated by three education labor law specialists, each of whom represented Petitioner during the week preceding his executing the resignation.

Whether grounds for rescission exist where an attorney executed the resignation agreement as Petitioner's agent and attorney, and where the attorney does not claim that he was misled or did not understand the terms of the agreement.

Whether grounds for rescission exist where Petitioner executed the resignation agreement two days after receiving it from his attorney and where Petitioner does not claim that he was misled or inadequately represented by his attorney.

Whether the trial court properly excluded evidence of the underlying investigation, school board decision-making process, and statement of charges as irrelevant and immaterial, given that Petitioner could have challenged the accusations of governmental misconduct, all of which were remote in time (18 months to three years) to execution of the resignation agreement by Petitioner and his attorney, a state law right which he waived by resigning his position rather than proceeding with the scheduled administrative hearing.

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OPINIONS BELOW

The decision of the California Court of Appeal, First Appellate District, dated January 18, 2000, affirmed the state trial court's verdict that Petitioner had failed to prove a legal basis for rescission of his resignation agreement. *See* App. A-1. On February 16, 2000 the state Court of Appeal denied a request for rehearing. *See* App. B-1. On April 19, 2000 the California Supreme Court denied a petition for review. *See* App. C-1.

JURISDICTION

Respondents argue below that the Petition for Writ of *Certiorari* fails to present matters within the jurisdiction of this Court. Petitioner's Complaint was filed in California Superior Court and was comprised *solely* of state law claims for rescission of his resignation agreement and declaratory and injunctive relief. There were no federal statutory or constitutional issues presented to the trial court or state Court of Appeal other than unpled purported due process violations which were *only* raised in Petitioner's briefing to the Court of Appeal. Yet by resigning his position rather than proceeding with the administrative hearing, Petitioner waived his statutory right to challenge his dismissal.

STATUTES AND OTHER PROVISIONS INVOLVED

California Civil Code § 1689 provides, *inter alia*, that:

> (b) A party to a contract may rescind the contract in the following cases:
>
> (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. . . .

INTRODUCTION

Respondents PETALUMA JOINT UNION HIGH SCHOOL DISTRICT and CHARLES-CADMAN, Superintendent (hereinafter collectively "DISTRICT") submit this brief opposing the Petition for Writ of *Certiorari* of an unpublished California appellate decision which affirmed the trial court's denial of rescission of a resignation agreement. Petitioner ZAMVIL, a former public high school teacher, irrevocably resigned his position on November 5, 1993 rather than proceed to a dismissal hearing scheduled before a three-person administrative law panel on November 8, 1993. JA:297-298.[1] The dismissal was based upon sixty-one (61) charges of misconduct, including

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[1] References to the Reporter's Transcript will be denoted as "RT:___" with citation to the relevant page(s); references to the joint appendix will be designated as "JA:___" followed by the pertinent page(s). The actual record will be submitted if the Petition is granted.

charges of sexual harassment directed at students, inappropriate touching of students, inappropriate statements to students and to parents, improper use of class time, leaving class unattended, and for failure to maintain integrity in his grading system. JA:286-294.[2]

Initially DISTRICT posits that the instant Petition is fatally defective for lack of jurisdiction as it fails to present questions of federal statutory or constitutional law. Once the self righteous polemics are set aside and the substance of the Petition is analyzed, there simply is no compelling reason to grant *certiorari* of a state law case for rescission where no federal statutory or constitutional issues were ever pled or raised in the proceedings below. ZAMVIL fails to identify any California statute repugnant to the Constitution or law of the United States. ZAMVIL fails to identify any conflict with any prior decision of this Court or any unsettled areas of the law. The facts presented are unique to ZAMVIL and fail to implicate any principles of general application.

ZAMVIL asserts that "[h]ad the District followed the law, there would not be a resignation and release." App. A-6. Yet he should have challenged the DISTRICT's charges and procedures in the administrative hearing and, if unsuccessful, judicial review of the administrative decision was available. *See* California Education Code §§ 44932, 44934, 44943-44945. App. D.

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[2] The trial court excluded evidence regarding the details underlying the charges on the grounds that the merits of the misconduct charges were irrelevant to a rescission action.

ZAMVIL ignores this Court's jurisdictional requirements as set forth in its rules. Assuming *arguendo* that jurisdiction is deemed proper, the state law causes of action and judgment fail to present substantive issues deserving review by this Court. Having failed to convince a state court discovery referee, the trial court, the California Court of Appeal, and the California Supreme Court of the soundness of his arguments, ZAMVIL attempts to ignite this Court's interest by portraying his asserted issues as raising waiver concerns of constitutional magnitude. His arguments are unavailing.

The crux of this matter is that ZAMVIL was provided his constitutional due process and rights under the California Education Code to challenge his dismissal; he consulted with various legal counsel and ultimately directed his attorney, as his attorney and agent, to execute a resignation agreement rather than to go forward with the administrative hearing scheduled for three days later. ZAMVIL himself executed the resignation agreement the next day, *in his attorney's office*. Yet ZAMVIL cites to federal due process violations without identifying any procedural defects in the administrative hearing process or any purported facts which he could not have discovered without due diligence prior to his resignation. The state Court of Appeal soundly rejected ZAMVIL's arguments and concluded that, while represented by competent legal counsel, he had waived his rights under the California Education Code when he chose to resign his position.

STATEMENT OF THE CASE

Despite ZAMVIL's polemics, in essence this case is simply a state law rescission action where ZAMVIL:

(1) engaged, through his attorney (Bertoli), in 18 months of administrative discovery and hearing preparation in an effort to challenge his dismissal before an administrative law panel, as was his statutory right under the California Education Code;

(2) retained three attorneys (Bertoli, Gallenson, Winslow) who specialized in education labor law and who, as the record establishes with unmistakable clarity, each negotiated his resignation terms during the week prior to the calendared administrative dismissal hearing (Bertoli, RT:208:28-209:28; 216:28-217:11; 314:21-315:4; Winslow, RT: 72:10-73:2; 96:5-21; 490:15-28; 493:21-496:16; and Gallenson, RT:289:5-10; 499:6-9);

(3) authorized one of his attorneys (Gallenson), as his attorney and agent, as ZAMVIL was working that day outside of Sonoma County, to execute the resignation agreement three days prior to the dismissal hearing (RT:390:21-26; 391:12-392:1; 392:15-19; 393:4-8); and

(4) executed the resignation agreement on the following day, in his attorney's office (RT:238:6-13).

ZAMVIL was fully advised as to the nature and content of the agreement by his attorneys; he does not claim that he was not adequately advised.[3] (RT:279:14-280:5; 393:4-8; JA:547-550)

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[3] ZAMVIL testified that it was his expectation that attorney " . . . Gallenson would handle [signing of the resignation]."

Relying on well-settled California law (*see Odorizzi v. Bloomfield School District*, 246 Cal.App.2d 123, 54 Cal.Rptr. 533) (1966), the California Court of Appeal correctly rejected ZAMVIL's attempt to litigate issues which may have been properly raised in the administrative forum, but were not relevant to the contract rescission action. The Court explained in its unpublished opinion that

> Zamvil has outlined a list of 17 purported instances of "egregious conduct" by the District- . . . . These run the gamut from drumming up complaints, falsifying records, concealing information and committing perjury to breaching the collective bargaining agreement to violating the Education Code, the Brown Act and board policies and bylaws.
>
> ¶ Zamvil contends the trial court erred in ruling that evidence relating to this alleged misconduct was irrelevant to his rescission action . . . . ¶ With these and similar statements, Zamvil consistently has tried to connect the events and processes leading up to the filing of charges – including the District's basis and preparation of the misconduct charges – with the execution of the resignation agreement itself. The problem

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RT:354:2-4. Gallenson testified that he had authority from ZAMVIL to execute the resignation agreement and that Gallenson understood the terms of the agreement. RT:283:22-25; 284:5-12. He considered ZAMVIL to have been his client when he executed the resignation agreement. RT:269:8-11; 288:14-19. Although Gallenson asserted attorney-client privilege with respect to any conversation he had with ZAMVIL regarding the resignation agreement (RT:288:3-7), he nevertheless testified that he had spoken with ZAMVIL "a number of times" during the week before he and ZAMVIL each signed the resignation agreement. RT:279:14-280:5.

> with this analysis is that duress, undue influence and fraud all go to whether or not Zamvil freely consented *to the agreement*.
>
> App. A-5-6 [Italics in original].

Although ZAMVIL portrays his action as one reaching beyond its precise contours into matters implicating widespread public policy concerns, in fact here there are no important public policy questions to overcome the jurisdictional flaws outlined below.[4] The trial court, and the Court of Appeal, both found *Odorizzi* to be the well-settled law in California regarding rescission actions and persuasive when applied to the facts of this case.

ZAMVIL's counsel told the trial court, " . . . this is an action for rescission, the purpose of which is to allow the Plaintiff to establish his good name and reputation with respect to his teaching career." RT:62:26-63:2; 331:25-27. ZAMVIL is mistaken. The trial court replied that in an action for rescission of a contract, evidence relevant to the investigation and applicable rules and proceedings was irrelevant. RT:331:28-332:1. A rescission action does not clear one's name; it rescinds a contract. Here the contract is the resignation agreement.

Prior to his intended dismissal, DISTRICT employed ZAMVIL as a high school teacher in August 1973.

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[4] To the extent that ZAMVIL cites to the administrative record, his citations do not support the sweeping legal conclusions asserted in his Petition. Moreover, the citations are frequently to lower court briefing rather than to admissible evidence. Indeed, ZAMVIL's offers of proof throughout the trial were devoid of admissible evidence and the trial court found them unavailing. The Court of Appeal agreed. App. A-6.

RT:331:8-9. He continued in that position until March 2, 1992, at which time he was suspended by DISTRICT's school board pending final disposition of 41 charges of misconduct filed by the school board on April 10, 1992. JA:286-294; RT:331:10-11. The charges included, *inter alia*, charges of sexual harassment and inappropriate touching of students. The charges were amended on February 23, 1993 after additional witnesses were interviewed; their accusations were included to reach 61 allegations of misconduct.

An administrative hearing was set for November 8, 1993. RT:341:6-7. The statement of 61 misconduct charges was prepared *solely* on the basis of the transcripts of parent and student interviews conducted by Jack Fitzgerald, the investigator retained by DISTRICT's legal counsel. RT:260:6-16; 436:8-11; 437:15-438:4; 515:10-13.

Throughout the eighteen- (18-) month administrative discovery and pre-hearing stage ZAMVIL was represented by a battery of attorneys, several of whom were teacher labor law specialists: Attorneys Weintraub (JA:71); Scher (JA:93); Fehl (JA:92); Bertoli (RT:208:28-209:28; 216:28-217:11; 314:21-315:4); Winslow (RT: 72:10-73:2; 96:5-21; 490:15-28; 493:21-496:16); and Gallenson (RT:289:5-10; 499:6-9) In addition to the extensive experience of Bertoli and Gallenson in representing teachers, the California Teachers Association employed Weintraub (JA:76) and Winslow (RT:96:5-8) to represent ZAMVIL in this matter. Only for a period of approximately one week (October 25 to November 4, 1993) was it unclear to DISTRICT whether ZAMVIL was represented by an attorney. RT:211:6-9.

A motion for continuance of the November 8th dismissal hearing was denied by an administrative law judge at hearing on November 3, 1993. RT:73:3-5; 74:20; 269:23-25. On ZAMVIL's behalf attorney Bertoli prepared a superior court motion to continue the dismissal hearing based on the grounds that he was without counsel and thus required additional time to prepare his case. RT:263:17-264:4. That motion was filed by ZAMVIL *in propria persona*, although attorney Gallenson appeared on his behalf and argued the motion. RT:222:15-223:16. On November 5th the court denied the request.

During the week preceding the November 8, 1993 administrative hearing on ZAMVIL's dismissal, settlement negotiations were engaged in by attorneys Bertoli, Winslow and Gallenson on behalf of ZAMVIL, and DISTRICT's counsel Margaret Merchat and Robert Henry. Bertoli and Gallenson negotiated terms and revisions to the draft resignation agreement, such as its effective date and a "neutral" employment reference.[5] JA:547; RT:231:1-232:1; 391:2-392:1. The resignation agreement also provided that DISTRICT would advise the Commission on Teacher Credentialing of the statement of charges. JA:544-546; RT:418:2-23. ZAMVIL testified falsely under oath that on November 4, 1993 he did not know about the requirement of notification to the Commission. The trial court found that ZAMVIL was untruthful. JA:545.

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[5] A neutral recommendation is one which states the period of time during which the employee worked for the DISTRICT, salary and position. RT: 97:6-13. *And see* paragraph 6 of resignation agreement. JA:297-298.

Before canceling the Monday dismissal hearing, DISTRICT required that the resignation agreement be fully executed no later than the close of business on Friday, November 5, 1993. RT:287:19-288:2. The purpose of the deadline was to clarify whether DISTRICT's 30 witnesses could be released and to determine the need for weekend hearing preparation by DISTRICT's counsel. ZAMVIL was working outside of Sonoma County on November 5, 1993; ZAMVIL authorized his attorney, Gallenson, to execute the agreement on his behalf. RT:284:5-8; 390:21-392:1. Gallenson executed the agreement and forwarded it to DISTRICT's counsel, at which time DISTRICT canceled the hearing. RT:233:24-236:4; 502:17-503:4; JA:297, ¶4. ZAMVIL executed the resignation agreement at Gallenson's office the next morning. RT:238:6-13.

On June 28, 1994 (JA:1) ZAMVIL filed a superior court rescission action. The trial court granted Defendants' motions *in limine* to exclude as irrelevant evidence that the misconduct charges were grounded in allegedly unlawful school board meetings and improper investigation. RT:3:17-5:3; 17:4-25:10; JA:330-338; 358-360; 373-375; 792-800. The trial court conducted a five-day bench trial.

The strength of DISTRICT's case is manifested by ZAMVIL's decision to resign rather than to contest the evidence against him. By the November 5th execution of the resignation agreement, ZAMVIL had extensively prepared for the dismissal hearing, intending to call some 70-80 witnesses. RT:259:25-28. ZAMVIL conducted sufficient discovery during the 18-month pre-hearing time

frame to identify these witnesses and to confront DISTRICT's case, if he wished to do so.[6]

The Discovery Referee and trial court rejected ZAMVIL's attempt to turn the rescission trial into the administrative hearing to which he had previously waived his right. The Report of the Discovery Referee was confirmed by court order dated June 10, 1996.[7] JA:427, 434-439. The trial court adopted the Discovery Referee's rationale. RT:20:4-19. Thus, in discovery there was an uncontested finding that the evidence ZAMVIL now claims requires reversal was not even discoverable, *i.e.*, not calculated to lead to the discovery of admissible evidence. In his appellate briefing ZAMVIL again unsuccessfully attempted to inject the Court into the role of the administrative law judge by seeking to introduce at the appellate level evidence of purportedly unfounded charges of misconduct and dismissal procedures.

For purposes of an administrative dismissal hearing, California Education Code § 44944 provides a statutory right to engage in broad administrative discovery to challenge an investigation and other perceived due process

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[6] The trial court excluded as irrelevant to the rescission action any evidence of the underlying investigation as well as school board policies and decision-making. The trial court's decision on this evidence was consistent with that of the Discovery Referee, who had concluded that discovery into these subjects (which had occurred 18 months to three years *prior* to ZAMVIL's resignation) was not even calculated to lead to the discovery of admissible evidence. JA:192-194; 325-329.

[7] ZAMVIL never challenged the Discovery Referee's decision by writ or any other action.

violations. It was during this 18-month pre-hearing process that ZAMVIL had both the *statutory mechanisms* and the *motivation* to identify facts supporting his government conspiracy theories.[8]

Contrary to ZAMVIL's assertion that "the District's violations were from the outset designed to 'steamroll' him," (Petition p. 5) "[t]he record demonstrates that Zamvil had the assistance of competent, informed counsel during the settlement process." (App. A-10)

ZAMVIL's allegations of governmental misconduct should have been asserted in the administrative forum. The unanimous Court of Appeal panel concluded that:

> [m]ore than 18 months had elapsed from the initial filing against Zamvil and the settlement. The District's conduct occurring up to initiation of the administrative proceeding was highly pertinent to the outcome of *that* proceeding. . . . His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections.
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> App. A-6-7 [Italics in original].

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[8] At p. 3, n.3 of the Petition ZAMVIL acknowledges what the record below demonstrates: that sufficient discovery had been conducted by ZAMVIL's attorney to identify 70-80 witnesses for trial subpoenas.

LEGAL ARGUMENT FOR DENYING THE WRIT

A. THE STATE COURT JUDGMENT BELOW IS BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS. THEREFORE ARGUABLY THIS COURT LACKS JURISDICTION OVER THIS MATTER.

In DISTRICT's view the instant Petition to review a judgment denying ZAMVIL's state court Complaint for rescission of his resignation should be summarily denied for lack of jurisdiction. Pursuant to Supreme Court Rule 14.1(e), a petition for writ of *certiorari* shall contain, *inter alia*, a statement of the basis for jurisdiction in this Court, showing the statutory provision believed to confer jurisdiction.

ZAMVIL ignores the function of the Supreme Court in the American system of government. This Court serves as the ultimate authority as to the meaning of the United States Constitution. Secondly, it must ensure the supremacy of federal law. Thirdly, this Court has the authority to resolve conflicting interpretations of *federal law* among the various state and federal courts, thereby ensuring the uniformity of federal law. Finally, this Court possesses the ultimate power to interpret federal statutes.

It is beyond dispute that this Court may decide only questions of federal law. This Petition arises from a judgment which is silent on federal law; judgment rested solely upon state law contract principles. Therefore, ZAMVIL is simply mistaken when he seeks *certiorari* of a state law action for rescission of a resignation agreement. Subject only to a narrow exception, not here relevant, this Court's authority to hear appeals from state courts is

based entirely on its role in upholding and interpreting federal law except where the state law issue is integrally tied to a federal question. *See e.g. Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (holding that the Court may review only questions of federal law and that the decisions of the state's highest court are final on questions of state law).

To determine whether the state court judgment is in fact based on independent and adequate state grounds, and whether any federal question has actually been considered and resolved, DISTRICT suggests that this Court turn to the California Court of Appeal decision reproduced at Appendix A hereto. The opinion shows that no federal interest is implicated. ZAMVIL's statement of jurisdiction recognizes that no federal constitutional or statutory right was raised below. The statement, found at page 1 of the Petition, is reproduced in full below:

> This Court's jurisdiction is invoked under 28 U.S.C. Sections 1257 and 2101, this being a petition arising out of a right claimed under the Constitution of the United States. The petition is filed within 90 days of April 19, 2000.

The plain language of 28 U.S.C. § 1257 demonstrates that ZAMVIL's Petition is fatally defective for lack of jurisdiction:

> Final judgments . . . by the highest court of a State . . . may be reviewed by the Supreme Court . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws

> of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Moreover, Supreme Court Rule 14(g)(i) sets forth specific jurisdictional requirements which ZAMVIL has failed to satisfy:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, *when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari . . .*
>
> [Italics added.]

ZAMVIL does not explain the grounds allowing him to fail to plead a federal statutory or constitutional issue in the Complaint upon which the trial is based, and then to seek to invoke federal jurisdiction by arguing a due process violation in the appellate briefing. ZAMVIL's opening brief to the state Court of Appeal ZAMVIL attempted to *retroactively* plead a due process cause of action:

6. The District's violations of law were more than simply statutory. "Public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process." *Board of Regents of State College v. Roth*, 408 U.S. 564, 578 (1972); *see also Perry v. Sindermann*, 408 U.S. 593, 602-603 (1972). Public employees dismissible only for cause are also entitled to a limited hearing *prior* to termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Absent a sufficiently strong governmental interest, due process is violated by failing to provide notice and hearing before suspending a tenured public employee without pay. *Gilbert v. Homar*, 520 U.S. 924 (1997)."

Opening Brief to Court of Appeal at p. 7 [Italics in original.]

Far more than civil statutory violations are implied by these [17] allegations. Indeed, the allegations implicate multiple violations of the United States and California Constitutions, and Sec. 1983 of the Federal Civil Rights Laws, which prohibits state action which subjects a citizen to a deprivation of rights and privileges secured by the Constitution and laws. 42 U.S.C. Sec. 1983. Indeed, plaintiff's allegations entail violations of State and Federal criminal laws.

Opening Brief to Court of Appeal at p. 31.

However, ZAMVIL's Complaint was limited to the following three *state law* causes of action:

1. Rescission of Contract for Fraud, Duress and Undue Influence;

2. Injunctive Relief; and

3. Declaratory Relief. JA:011-014

Moreover, after receiving an adverse decision at trial, ZAMVIL failed to request any finding of fact or conclusion of law in the Statement of Decision as to a federal or constitutional ground. *See* JA:444 ("Whether Zamvil was allowed at trial to introduce any evidence concerning the voidability of the District's action against Zamvil due to procedural violations, not in compliance with California Government Code, California Education Code, the collective bargaining agreement, Petaluma School Board by-laws and policies.")

Therefore, ZAMVIL's fatal error is that this Court lacks jurisdiction to review a judgment based on independent and adequate state grounds. Indeed, the substantive legal issues of contract rescission in the proceedings below involved the law and statutes of the State of California, not federal law. *See e.g. Klinger v. Missouri*, 13 Wall. 257, 263 (1871) (if the Court concludes that the state law ground is both independent and adequate to support the judgment, "this court will not assume jurisdiction of the case.") This rule is therefore a corollary of the fundamental principle that the Court lacks jurisdiction to review matters of state law. That principle flows from the United States Constitution Article III limitation on federal judicial power, and also from the jurisdictional requirements imposed by 28 U.S.C. § 1257.

An adequate state ground requires that it be independent of any federal ground. ZAMVIL's failure to sufficiently identify federal rights raised below compels the

conclusion that proper and sufficient jurisdictional grounds have not been presented to this Court.

It is also well established that this Court defers to the Circuit Courts of Appeal regarding interpretation of state law and therefore will only rarely grant review to correct errors in interpreting state law. *See e.g. McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997). The same deference should apply to the state courts below.

It is well-settled that the purpose of Supreme Court review is (1) to determine important constitutional questions; (2) to interpret federal statutes; and (3) to maintain harmony among the decisions of the Circuit Courts of Appeal and with state court interpretations of federal questions. *See* Supreme Court Rule 10.

In the proceedings below the California Supreme Court denied ZAMVIL's Petition for Review. *See* Appendix C-1 hereto. The Petition for Writ of *Certiorari* does not demonstrate that the California courts wrongly decided, *or even considered*, any important question implicating federal law or the Constitution. There is no issue of a state court of last resort having decided a federal question in conflict with another state court of last resort or with a federal court. In the final analysis, the state court decision below fails "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974); *and see Arizona v. Manypenny*, 451 U.S. 232, 239 (1981).

In sum, ZAMVIL made no adequate offer of proof in writing or otherwise during the trial and he continues to fail to show any link between the alleged governmental misconduct and grounds for rescission.[9] As the Court of Appeal opined, "[t]he trial court's evidentiary decisions were sound." App. A-8. Having failed to exercise his statutory rights to discover relevant facts as to "fraudulent concealment," or to explain why he could not have obtained the facts through diligent discovery, ZAMVIL waived his objections. Having waived his administrative remedies, he is now bound by the execution and terms of his resignation agreement. There are no grounds which implicate Supreme Court review. *Certiorari* should be denied.

B. ASSUMING *ARGUENDO* THAT JURISDICTION IS DEEMED PROPER, ZAMVIL FAILS TO PRESENT SUBSTANTIVE ARGUMENTS DESERVING REVIEW OF THIS STATE LAW CONTRACT RESCISSION ACTION.

1. The State Court of Appeal Properly Concluded That by Resigning ZAMVIL Had Waived His Rights.

As held by the state Court of Appeal, any constitutional due process issue was waived when ZAMVIL

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[9] ZAMVIL does not assert that he made any demand to "cure" any procedural defects in the purportedly unlawful school board meetings, as provided for under applicable statutory authority. Violations of the Brown Act are voidable, not void as a matter of law. *See* Government Code § 54960.1. App. D.

decided to resign his teaching position rather than avail himself of the administrative challenge to which he had a right under the California Education Code:

> . . . Zamvil had plenty of time to investigate and take action within the administrative proceeding with respect to all the purported violations. . . . His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections. Appendix A-7.

The Court of Appeal observed that:

> [i]n order to cancel the administrative hearing set for Monday, November 8, the District required that the resignation agreement be executed by the close of business on Friday, November 5. The District was looking at calling approximately 30 witnesses in the event the hearing went forward. Zamvil, however, was out of town on a teaching assignment, so Attorney Gallenson signed the resignation agreement for him on Friday; Zamvil executed it in person on Saturday. The District in turn canceled the proceeding. . . . *Seven months later Zamvil filed his action for rescission of the resignation agreement on account of duress, undue influence and fraud.*
>
> Appendix A-3 [Emphasis added.]

The following admissions by ZAMVIL established the absence of grounds for rescission while upholding the legal viability of the resignation agreement:

1. ZAMVIL's verified Complaint omits any allegation that, after signing his resignation agreement, he learned of any new information which would support his

rescission grounds of fraudulent concealment of facts or undue influence.

2. ZAMVIL never asked attorney Gallenson to communicate to DISTRICT's legal counsel that he was too emotionally distraught or "tired" to enter into a resignation agreement. RT:393:13-17; 399:14-20.

3. ZAMVIL does not claim that attorney Gallenson pressured him into signing the resignation agreement. RT:394:7-10.

4. ZAMVIL was given a draft of the resignation agreement *two days* prior to him signing the agreement in Gallenson's office. RT:394:11-28.

The trial court properly concluded that the elements of rescission had not been proven:[10]

> *FINDING:* Mr. Gallenson, plaintiff's counsel, understood the terms of the resignation agreement. He signed the agreement as agent and attorney for Mr. Zamvil and with his authority on November 5, 1993. Mr. Bertoli and Mr. Gallenson advised Mr. Zamvil regarding the terms of the contract. The contract is valid. No grounds for rescission have been proved.

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[10] California Civil Code § 1689 provides, *inter alia*, that:

(b) A party to a contract may rescind the contract in the following cases:

> (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. . . .

. . .

FINDING: The resignation agreement was not signed under duress caused by the defendants. Based on the evidence, plaintiff has not proven any unlawful action or threat on the part of defendants which caused plaintiff to sign the resignation agreement rather than go forward with the administrative hearing.

. . .

FINDING: 1. Plaintiff was advised by three attorneys, who are CTA [California Teachers Association] specialists.

2. Counsel for District was negotiating with plaintiff's attorneys during regular business hours.

3. The transaction was consummated in Mr. Gallenson's office on both November 5 and November 6, 1993.

4. The only consequences of delay of reaching an agreement would have been that Mr. Zamvil proceed with the administrative hearing as he had a right to do.

5. Mr. Zamvil's attorney, Mr. Gallenson, did not believe the evidence would be admitted at the administrative hearing regarding Mr. Zamvil's past drug use with students.

6. No multiple persuaders attempted to dominate an unrepresented individual. All communications regarding settlement were made through plaintiff's attorneys.

. . .

> *FINDING:* The record is devoid of evidence of fraudulent statements or acts by defendants intended to secure the signature of defendant to the resignation agreement.
>
> . . .
>
> *FINDING:* Plaintiff failed to plead mistake in his Complaint in this action. Further, the record establishes that the material facts of the transaction were known to both parties. Neither party was under any misapprehension of law of which the other took advantage. There was no mistake by the plaintiff in his understanding of the nature and consequences of signing the resignation agreement.
>
> JA:572-573.

Ultimately, it was ZAMVIL's burden to show that (1) he subsequently obtained knowledge regarding unlawful conduct by DISTRICT which he did not possess when executing the resignation agreement, and (2) that this knowledge was fraudulently or otherwise impermissibly withheld or concealed by DISTRICT. He failed to make such a showing.[11] For example, at Petition pp. 10-11 he asserts that it was not until Superintendent CADMAN's deposition that it was revealed that the August 14, 1990

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[11] ZAMVIL alleges at Petition pp. 4-5 that a tape recording was made of the 1990 school board meeting. However, there was no offer of proof that the tape even existed, and the Discovery Referee concluded that ZAMVIL had not articulated a theory of the school board meetings' relevance to the rescission action. Likewise, there was no offer of proof based on information from persons interviewed by investigator Fitzgerald that DISTRICT attempted to fabricate evidence, nor did ZAMVIL even identify those witnesses.

hearing was an open public meeting. However, (1) given the Brown Open Meeting Act (California Government Code §§ 54950, *et seq.*) notice requirements and the Public Records Act (California Government Code §§ 6250, *et seq.*) ZAMVIL had constructive knowledge of or with due diligence could have learned years before his resignation of the open or closed status of that school board meeting (*see* App. D); (2) he could have challenged its lawfulness in the administrative hearing; and (3) CADMAN's deposition was not made part of the appellate record. The Discovery Referee reached the same conclusion as had the trial court regarding this irrelevant evidence:

> . . . [P]laintiff has not articulated a theory of how the events at the closed school board meetings will lead to the discovery of admissible evidence. There has been no indication, by way of theory, offer of proof or otherwise, that the events that occurred at the school board meetings will guide the plaintiff to evidence of fraud, duress or undue influence.
>
> JA:194.[12]

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[12] DISTRICT further notes that ZAMVIL misstates the record when he asserts that "the immoral conduct charges arose out of the allegedly secret August 14, 1990 Board of Education hearing. Petition, p. 5. Rather, the record speaks with clarity to the point that the charges were based *solely* on investigator Fitzgerald's witness interviews, which *were* provided to ZAMVIL. RT:260:6-16; 436:8-11; 437:15-438:4; 515:10-13. ZAMVIL does not claim that those transcripts were withheld. Moreover, ZAMVIL fails to cite to the record in support of his allegation that a transcript of any August 14, 1990 Board of Trustees' meeting indeed ever existed.

2. ZAMVIL Was Represented by Legal Counsel for the Purpose of Executing His Resignation.

As a rationale for not proceeding with the administrative hearing, ZAMVIL places strong reliance on his purported *in pro per* status. Petition, p. 3. However, the record below demonstrates that ZAMVIL was represented by *six* attorneys throughout the pre-administrative hearing stage and *three* attorneys negotiated the resignation agreement on his behalf. RT:489:1-5.[13]

ZAMVIL does *not* claim that he has discovered any new evidence subsequent to signing his resignation agreement which he could not have learned earlier with due diligence during his attorneys' 18 months of administrative discovery.

3. ZAMVIL's Attorney and Agent for Executing the Resignation Has Not Claimed Any Misconduct by DISTRICT Warranting Rescission.

Gallenson never asserted that DISTRICT was overreaching in any manner or that the resignation agreement did not accurately represent the negotiated terms. There is no evidence in the record that Gallenson or ZAMVIL

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[13] During settlement negotiations during the week prior to the November 8, 1993 dismissal hearing, ZAMVIL's counsel requested that the resignation agreement reflect an effective resignation date of June 30, 1994, to make it appear that his resignation occurred after the end of the school year. DISTRICT agreed to this modification. JA:297, ¶1. *And see* Trial Exhibits D and E.

did not understand the resignation terms.[14] Moreover, no new evidence as to DISTRICT's actions is alleged to have been discovered by ZAMVIL subsequent to his execution of the resignation agreement that had either been concealed by DISTRICT or that could not have been discovered with due diligence. Therefore, as the Court of Appeal concluded, there was simply no basis for rescission of the resignation.

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[14] At Petition pp. 11-12 ZAMVIL enumerates 17 offers of proof which he was allegedly denied the opportunity to prove at trial. This purported misconduct by DISTRICT includes alleged violations of statutes, DISTRICT policies and bylaws, and unethical behavior. ZAMVIL could have raised these issues at his administrative hearing. However, instead ZAMVIL chose to resign and he should not be allowed to circumvent his administrative remedy.

CONCLUSION

Upon the reasons set forth above, Respondents PETALUMA JOINT UNION HIGH SCHOOL DISTRICT and CHARLES CADMAN, SUPERINTENDENT, respectfully urge that the Petition for Writ of *Certiorari* be denied.

Dated: August 21, 2000

Respectfully submitted:

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